Nos. 80-1343, 80-1408

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In the Supreme Court of the United States

OCTOBER TERM, 1980

AERONAUTICAL RADIO, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Where the Federal Communications Commission waived a procedural rule that was adopted for the orderly transaction of its ratemaking function and denied petitions to reject a carrier-initiated rate filing that were grounded on the carrier's failure to comply with the procedural rule, did the Court of Appeals err in finding that the decision to accept the rate filing was unreviewable?

2. Did the Court of Appeals and the Commission err in finding that Section 214(a) of the Communications Act, which requires agency approval before a common carrier may "discontinue, reduce, or impair service to a community," is not applicable where the carrier withdraws a volume discount rate for certain services but all the services remain available?

TABLE OF CONTENTS

	Page
Questions Presented	I
Opinions Below	2
Statutes and Regulations Involved	2
Statement	3
Argument	9
I. The Court of Appeals' Ruling On Reviewability Is Consistent With Established Precedent That Has Been Reaffirmed In Recent Actions Of This Court, And Does Not Conflict With Rulings In The D.C. Circuit Or Other Courts Of Appeals	10
II. The Court Of Appeals And The FCC Ruled Correctly That Withdrawal Of The Telpak Discount Did Not "Discontinue, Reduce, Or Impair Service" Within The Meaning Of Section 214(a) So As To Require Prior Certification By The Agency	18
Conclusion	23

TABLE OF AUTHORITIES

Cases:

Aberdeen & Rockfish R. Co. v. *SCRAP*, 422 U.S. 289 (1975) 10, 17

American Broadcasting Co. v. *FCC*, D.C. Cir. No. 78-1968 (decided April 28, 1980) 15

American Farm Lines v. *Black Ball Services*, 397 U.S. 532 (1979) 9, 12, 13, 16

American Trucking Ass'ns, Inc. v. *FCC*, 377 F.2d 121 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967) 4, 19, 22

AT&T v. *FCC*, 449 F.2d 439 (2d Cir. 1971) 19

Arrow Transp. Co. v. *Southern Ry. Co.*, 372 U.S. 658 (1963) ..... *passim*

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Cases—Continued Page

Associated Press v. *FCC*, 448 F.2d 1095 (D.C. Cir. 1971) 14
Atchison, T. & S.F. R. Co. v. *Wichita B'd of Trade*, 412 U.S. 800 (1973) 10
AT&T v. *FCC*, 487 F.2d 864 (2d Cir. 1978) 11, 18
AT&T v. *FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978) 4, 5, 21
Chicago & N.W. Transp. Co. v. *Kale Brick & Tile Co.*, 49 U.S.L.W. 4232 (decided March 9, 1981) 21
Consolidated Rail Corp. v. *NARI*, 49 U.S.L.W. 3529, 449 US. —— (Jan. 26, 1981) 10
FPC v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956) 15
International Business Machines Corp. v. *FCC*, 570 F.2d 452 (2d Cir. 1978) 14
MCI Telecommunications Corp. v. *FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) 20
NLRB v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969) 22
Papago Tribal Util. Authority v. *FERC*, 628 F.2d 235 (D.C. Cir.), *cert. denied*, 49 U.S.L.W. 3443, 449 U.S. —— (1980) ..... *passim*
Ralph Nader v. *FCC*, 520 F.2d 182 (D.C. Cir. 1975) 11
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 7, 8, 20
Southern Natural Gas Co. v. *FPC*, 547 F.2d 826 (5th Cir. 1977) 14
Southern Ry. Co. v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979) ..... *passim*
Udall v. *Tallman*, 380 U.S. 1 (1965) 8
United Gas Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) 15
United States v. *ICC*, 337 U.S. 426 (1949) 1, 12
United States v. *SCRAP*, 412 U.S. 669 (1973) 10, 17
Western Union Division v. *U.S.*, 87 F.Supp. 324 (D.D.C.), aff'd, 338 U.S. 864 (1949) 18
Wisniewski v. *U.S.*, 353 U.S. 901 (1957) 15

Administrative Decisions: Page

AT&T (Docket No. 20814), 59 FCC 2d 428 (1976).. 6
AT&T (Docket No. 20814), 62 FCC 2d 35 (1976).. 6
AT&T (Docket No. 20814), 65 FCC 2d 295 (1977) 6
AT&T (Docket No. 20814), 74 FCC 2d 1 (1979), *review pending sub nom Southern Pacific Comm. Co.* v. *FCC*, D.C. Cir. No. 79-2212 (filed Oct. 10, 1979) 6
Resale & Shared Use Of Common Carrier Services & Facilities, 60 FCC 2d 261 (1976), *on reconsid.*, 62 FCC 2d 588 (1977), *aff'd sub nom AT&T* v. *FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978) 4, 22
Tariffs-Evidence, 40 FCC 2d 147 (1973), *denying reconsideration of* 25 FCC 2d 957 (1970) 5, 13

Statutes and Regulations:

Communications Act of 1934, 47 U.S.C.:

Section 4(i) & (j), 47 U.S.C. § 154(i) & (j).. 2
Sections 201-209, 47 U.S.C. §§ 201-209 .....2, 14, 20
Section 201(b), 47 U.S.C. § 201(b) 14, 20
Section 205(a), 47 U.S.C. § 205(a) 14, 20
Section 214(a), 47 U.S.C. § 214(a) .....*passim*
Section 222, 47 U.S.C. § 222 18
Section 402(a), 47 U.S.C. § 402(a) 2, 7

28 U.S.C. § 2342(1) 2, 7
28 U.S.C. § 2348 1

47 C.F.R. § 61.38 .....*passim*

Other Authorities:

H.R. Rept. No. 69, (Consolidations or Mergers of Domestic Telegraph Carriers), 78th Cong., 1st Sess. (1943) at 10-11 18

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

The Federal Communications Commission respectfully asks the Court to deny petitions for writ of certiorari filed by large-scale government and private customers of telecommunications service. The Solicitor General in this case represents the government as a customer aggrieved by a rate decision of the Commission. The Commission is represented by its own litigation counsel. 28 U.S.C. § 2348. See *United States* v. *ICC*, 337 U.S. 426 (1949).

OPINIONS BELOW

The June 24 opinion of the Court of Appeals (ARINC App. A, pp. 1-53)[1] and the November 5 revisions and opinion on rehearing (ARINC Apps. B and C, pp. 54-66) are not yet reported.[2] The opinions and orders of the FCC are reported at 64 FCC 2d 959 (ARINC App. D, pp. 67-78), 64 FCC 2d 958 (ARINC App. E, p. 79), and 65 FCC 2d 7 (ARINC App. F, pp. 80-81).

STATUTES AND REGULATIONS INVOLVED

Sections 4(i) and (j), 201-209, 214(a) and 402(a) of the Communications Act of 1934,[3] as amended,[4] 47 U.S.C. §§ 154(i) and (j), 201-209, 214(a) and 402(a); Section 2342 of Title 28, United States Code; and Section 61.38 of the FCC's Rules and Regulations, 47 C.F.R. § 61.38, are involved in these petitions. Sections 201-209 and 214 of the Communications Act and Section 61.38 of the FCC's Rules and Regulations appear at ARINC App. K, pp. 199-211. Section 402(a) of the Communications Act and Section 2342

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[1] "ARINC App." refers to the appendix to the petition of Aeronautical Radio, Inc. (ARINC) and the Air Transport Ass'n of America in No. 80-1343.

[2] The June 24 opinion also disposes of petitions for review of separate but related FCC decisions which established general ratemaking principles to govern AT&T's allocation of costs among its service categories. (ARINC App. A, pp. 12-17). Judge Wilkey's dissent to the June 24 opinion deals only with the ratemaking principles decision. (ARINC App. A, pp. 29-53). It has no relevance to the tariff revisions that are the subject matter of the petitions for certiorari in this Court.

[3] 48 Stat. 1164.

[4] The Act is codified as 47 U.S.C. §§ 151-609.

of Title 28 appear at United States Petition, pp. 1-2. The pertinent parts of Section 4(i) and (j) of the Communications Act follow:

Section 4:

* * * *

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

(j) The Commission may conduct its proceedings in such manner as will conduce to the proper dispatch of business and to the ends of justice . . . .

STATEMENT

The FCC decision in this case allowed carrier-initiated tariff revisions to become effective over the objections of customers who had argued that the Commission should either reject the revisions summarily or suspend and investigate them. The revisions withdrew a volume discount rate, known as Telpak, under which large customers of the American Telephone and Telegraph Co. (AT&T) could obtain either 60 or 240 "private line" circuits at a substantial discount below the rate they would pay for the same number of circuits individually.[5] The de-

[5] A "private line" is a leased circuit that is dedicated in some significant way to the customer's exclusive use, outside the public telephone network. Generally, private line services are limited to communications between or among specific points selected in advance, such as the several plants or offices of a business firm. Customers who buy private lines, however, may combine them with other services so as to create private networks that operate much like ordinary

cision has the effect of permitting the demise of the volume discount and leaving the large customers to pay the same rates for individual circuits that smaller customers were paying, if they chose to continue leasing multiple private lines from AT&T. (ARINC App. D).

AT&T filed its Transmittal No. 12714 on March 23, 1977, announcing tariff revisions that would withdraw its Telpak discount rates. The transmittal letter stated that AT&T was withdrawing Telpak and not filing a replacement volume discount rate because it was AT&T's business judgment that a volume discount was not feasible in a "resale and sharing" environment. (ARINC App. D, pp. 68-69).[6]

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message telephone (MTS) or wide area telecommunications service (WATS) networks. The Federal Telecommunications System (FTS) is an example of this kind of private network. Private line customers pay a flat monthly charge, rather than toll charges for individual calls. Telpak is an offering of multiple private lines at a volume discount. See *American Trucking Ass'ns, Inc.* v. *FCC*, 377 F.2d 121 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967).

[6] The FCC some months earlier had concluded a far-reaching rulemaking proceeding with a decision directing AT&T and other communications carriers to eliminate restrictions on "resale and sharing" of private line services and facilities. *Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261 (1976), *on reconsid.*, 62 FCC 2d 588 (1977), *aff'd sub nom. AT&T* v. *FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978). The decision permitted customers of the established carriers (1) to act as brokers of private line services which they could buy from a telephone company and resell to ultimate users for a profit, and (2) to aggregate their communications needs so that they could buy services jointly and share both the services and the charges. The decision applies to all private line services, including those offered at Telpak discount rates. 60 FCC 2d at 285-89. The FCC was aware in its resale decision that AT&T

Several parties, all of them customers who had benefited from the Telpak discounts, petitioned the FCC to reject the tariff revisions. They argued primarily (1) that AT&T could not withdraw Telpak "service" without first obtaining FCC authorization under Section 214(a) of the Communications Act,[7] and (2) that AT&T had not supported its tariff revisions with cost data as required by Section 61.38 of the Commission's rules.[8]

The FCC denied the petitions to reject and allowed the tariff revisions to become effective in the Telpak orders that are the subject of this certiorari proceed-

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might withdraw Telpak rather than subject it to resale and sharing. The FCC found that, even if Telpak could not exist without restrictions on resale and sharing, "its continued availability is not as important to the public as are the benefits which we see as resulting from resale and sharing . . . ." *Id.* at 286. AT&T's withdrawal of Telpak was to occur on the date of effectiveness of the resale decision. In their brief on the merits in the Second Circuit's review of the resale decision, the FCC and the Justice Department represented that "AT&T would be free to initiate rate changes that would eliminate Telpak" if the resale policy made such a rate decision necessary in the carrier's judgment. Brief for Respondents, note 60 at p. 55, *AT&T* v. *FCC*, 572 F.2d 17.

[7] Section 214(a) states, in pertinent part, that no carrier may "discontinue, reduce, or impair service to a community" without first obtaining from the FCC "a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby . . . ."

[8] Section 61.38 requires carriers to file cost data in support of rate filings. The purpose of this rule is "to provide [the Commission] with information by which, in the reasonable exercise of [its] discretion, [it] can determine the orderly and proper procedures to follow in the solution of the difficult and complex problems increasingly presented in tariffs . . . ." *Tariffs-Evidence*, 40 FCC 2d 147, 152-53 (1973), *denying reconsideration of* 25 FCC 957 (1970).

ing. The Commission found that authorization under Section 214(a) was not required because the demise of Telpak would not result in "a discontinuance, reduction, or impairment of service to a community . . . ." All the services offered under Telpak rates, the FCC pointed out, will remain available under private line tariffs. Where the service remains available, the FCC said, Section 214(a) does not come into play. (ARINC App. D, pp. 72-73).

The FCC found also that Section 61.38 did not require rejection in this instance because AT&T was not changing its Telpak rates or creating a new volume discount rate. Instead, AT&T was withdrawing a discount rate and allowing its private line services to be governed by individual circuit rates that already were under investigation.[9] AT&T had filed cost data in that investigation purporting to justify its individual circuit rates, and was under order to file additional cost data.[10] Even if Section 61.38 were

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[9] AT&T's private line rates were under investigation in the so-called Multi-Schedule Private Line (MPL) hearing. *AT&T* (Docket No. 20814), 59 FCC 2d 428 (1976). The Commission now has completed that hearing and found that AT&T had not justified its private line rates. *AT&T* (Docket No. 20814), 74 FCC 2d 1 (1979), *review pending sub nom. Southern Pacific Comm. Co.* v. *FCC*, D.C. Circuit No. 79-2212 (filed October 10, 1979).

[10] See *AT&T* (Docket No. 20814), 62 FCC 2d 35 (1976). On the same day on which it denied the petitions to reject the Telpak withdrawal tariff, the FCC accepted AT&T's filing of reduced individual circuit rates that had been designed to "mitigate" the loss of Telpak. The Commission expanded the MPL rate hearing to include the new reductions and directed AT&T to file additional cost data, in satisfaction of Section 61.38, to support the reduced rates. *AT&T* (Docket No. 20814), 65 FCC 2d 295, 297-98, 301-06 (1977).

applicable to this tariff revision, the FCC said it would waive the requirement *sua sponte*. (ARINC App. D, p. 74).[11]

In its June 24, 1980, opinion,[12] the Court of Appeals agreed with the FCC that Section 214(a) did not require rejection of the tariff because the termination of Telpak "did not in fact discontinue, reduce, or impair any service at all . . . ." Concurring in the Commission's finding that all the services which had been offered under Telpak were still available pursuant to other tariffs, the Court of Appeals concluded that Section 214(a) "did not apply in this case." (ARINC App. A, pp. 23-24).[13] The Court of

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[11] See also, *AT&T, supra*, 65 FCC 2d at 302-03. The Commission also denied the petitions of some of the customer parties to suspend and investigate the Telpak tariff if it did not reject. The Commission's decision not to suspend and investigate is not challenged in this Court. See *Southern Ry. Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979).

[12] While review was pending below, the Court of Appeals enjoined AT&T from withdrawing Telpak rates to customers served as of July 21, 1977. (U.S. Pet. App. E, pp. 10a-13a). That injunction remains in effect pending disposition of petitions for certiorari. (U.S. Pet. App. A, pp. 1a-2a). The Commission believes the injunction is beyond the authority of the Court of Appeals. We have not asked this Court for relief from the injunction because the Court will be in a position to dispose of the petitions for certiorari promptly after the filing of our opposition. If that occurs, there will be no need for the additional pleadings that would be entailed in an application to the Circuit Justice to vacate the injunction.

The petitioners below invoked the Court of Appeals' jurisdiction pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342 (1). The Justice Department did not file a petition for review on behalf of the government customers, but opposed the FCC in its brief for the United States as a statutory respondent. (ARINC App. A, pp. 12-13).

[13] That Court amended its discussion of Section 214(a) on rehearing. It added citations to *Red Lion Broadcasting Co.* v.

Appeals held that it was error, however, for the FCC to excuse AT&T from filing cost data in support of the tariff change. That Court found that, in practical effect, the tariff revisions increased the rates for Telpak customers, so that Section 61.38 was applicable. It found further that, in view of the size of the increase, it was an abuse of discretion to waive the rule. (ARINC App. A, pp. 24-27).[14] The June 24 opinion did not address the question of reviewability.[15]

On a petition for rehearing by AT&T, which the FCC supported, the Court of Appeals issued amendments and a second opinion on November 5, 1980.[16]

FCC, 395 U.S. 367 (1969), and *Udall* v. *Tallman*, 380 U.S. 1 (1965), to support its deference to the FCC's interpretation of its own statute, and it modified its conclusion to state:

> We agree with the FCC's holding that § 214(a) did not apply in this case.

(ARINC App. B, p. 57).

[14] The June 24 opinion directed the FCC to reject the tariff filing within 120 days and continued the injunction in effect until the Commission had rejected the filing. The opinion said that the 120-day period "should be sufficient to allow AT&T time to assemble the appropriate § 61.38 data and submit them in connection with a new transmittal terminating Telpak." (ARINC App. A, pp. 27-28). The Court of Appeals noted that while AT&T was not required to terminate Telpak, it was "permitted to do so." *Id.* at n.32.

[15] AT&T had argued that the Telpak decisions were unreviewable. Br. for Intervenor AT&T, pp. 15-19. The FCC had invited that Court's attention to this Court's decision in *Southern Ry. Co.* v. *Seaboard Allied Milling Corp.*, *supra*, 442 U.S. 444, with respect to the issue of reviewability. See letter of June 22, 1979, to George A. Fisher, Clerk, from John E. Ingle.

[16] That Court on November 26, 1980, denied other petitions for rehearing and suggestions of rehearing *en banc*, including petitions challenging the ruling with respect to Section 214 (a). (ARINC App. J, p. 196).

(ARINC Apps. B and C). The November 5 decision reaffirmed the earlier ruling with respect to Section 214(a). (*Id.*, p. 57). But it held that the FCC's acceptance of the Telpak tariff revisions and its waiver of Section 61.38 were not reviewable. (*Id.*, pp. 58-62, 64-66). The November 5 decision relied primarily upon this Court's 1979 opinion in *Southern Ry. Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444; the earlier opinion in *American Farm Lines* v. *Black Ball Services*, 397 U.S. 532 (1979); and the District of Columbia Circuit's own recent opinion in *Papago Tribal Util. Authority* v. *FERC*, 628 F.2d 235 (1980),[17] in its holding on reviewability. The Court of Appeals on January 27 denied the Justice Department's petition for further rehearing on the issue of reviewability and its suggestion of rehearing *en banc*, with no member of the Court asking that a vote be taken on the petition. (ARINC App. J, pp. 197, 198).

ARGUMENT

The Court of Appeals applied well established legal principles in declining to review the FCC's denial of petitions to reject a tariff filing that were grounded on AT&T's failure to file supporting cost data, where the Commission had waived the procedural rule requiring cost data and the petitioning parties retained their rights under complaint procedures to challenge on the merits the rates they would pay under the tariff revisions. The Court of Appeals also deferred

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[17] This Court later denied a petition for certiorari in *Papago*. 49 U.S.L.W. 3443, 449 U.S. —— (December 15, 1980). The Solicitor General, on behalf of FERC, urged the Court to deny certiorari in *Papago* because the decision was "consistent with the decisions of this Court and other courts of appeals . . . ." Brief for the FERC in Opposition, pp. 3-7.

properly to the FCC's interpretation of Section 214 (a) of the Communications Act in holding that termination of the Telpak discount rates did not "discontinue, reduce, or impair service" within the meaning of the statute so as to require prior agency approval. The decisions below are consistent with the decisions of this Court and other courts of appeals, and do not merit further review.

I. The Court Of Appeals' Ruling On Reviewability Is Consistent With Established Precedent That Has Been Reaffirmed In Recent Actions Of This Court, And Does Not Conflict With Rulings In The D.C Circuit Or Other Courts Of Appeals.

A consistent line of decisions in tariff review matters establishes that the courts have no authority to determine the timing of carrier-initiated rate filings.[18] The decisions have held specifically that the courts lack authority (1) to enjoin rate filings either directly,[19] or indirectly by reviewing decisions not to suspend,[20] (2) to require a regulatory agency to roll back rates even when the agency has issued a final and reviewable order and has been found in error,[21] and (3) to review agency decisions at the tariff filing

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[18] *E.g., Arrow Transp. Co.* v. *Southern Ry. Co.*, 372 U.S. 658 (1968); *United States* v. *SCRAP*, 412 U.S. 669 (1973); *Atchison, T. & S.F. Co.* v. *Wichita B'd of Trade*, 412 U.S 800 (1973); *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289 (1975); *Southern Ry. Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444; *Consolidated Rail Corp.* v. *NARI*, 49 U.S.L.W. 3529, 449 U.S. —— (January 26, 1981).

[19] *E.g., Arrow Transp. Co.*, 372 U.S. 658.

[20] *E.g., United States* v. *SCRAP*, 412 U.S. at 690-98.

[21] *E.g., Atchison, T. & S.F. R. Co.* v. *Wichita B'd of Trade*, 412 U.S. at 822; *Consolidated Rail Corp.* v. *NARI*, 49 U.S.L.W. 3529.

stage, not to investigate rates that are alleged to be patently unlawful and thus to allow the rates to become effective.[22]

The Court of Appeals in this case acted consistently with that line of decisions and, more particularly, with the Court's reasoning in the 1979 *Southern Railway* case. *Southern Railway* held that a decision by the Interstate Commerce Commission not to investigate a tariff revision and thus to allow it to become effective—even in the face of allegations that the rates were patently unlawful—was unreviewable. Its reasoning was that such a decision was committed to the discretion of the agency and that complaint procedures remained available to allegedly aggrieved ratepayers.[23]

The D.C. Circuit, in its 1980 *Papago Tribal Util. Authority* decision, extended *Southern Railway* logically to find generally unreviewable an agency refusal to reject a carrier-initiated tariff:

> From *Arrow Transportation* and *Southern Railway* it follows a fortiori that the order presented

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[22] *Southern Ry. Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444.

[23] 442 U.S. at 454-63. The Court found "clear and convincing evidence" that Congress meant to prohibit "all judicial review" of the ICC's decisions not to investigate. *Id.* at 462. The *Southern Railway* decision resolved a conflict between the Eighth and D.C. Circuits on the reviewability of decisions not to investigate. *Id.* at 447-48 & n.2.

Although the Supreme Court decisions in this line of cases all involved the ICC, the reasoning is applicable to the FCC and other agencies with essentially identical regulatory statutes. See *Ralph Nader* v. *FCC*, 520 F.2d 182 (D.C. Cir. 1975); *AT&T* v. *FCC*, 487 F.2d 864 (2d Cir. 1973). *Cf. Papago Tribal Util. Authority*, 628 F.2d 235.

> for review in this case is unreviewable. The decision whether to reject or to accept a rate filing is based on precisely the same information, and primarily the same considerations, that govern decisions to suspend or not to suspend, to investigate or not to investigate. The decision to accept a rate filing is a necessary adjunct to the unreviewable decision [whether] to suspend and investigate. It would make little sense to declare orders concerning suspension and investigation unreviewable if the courts may review the related order to accept a rate filing. A holding that we could assume jurisdiction in this case would, in effect, avoid the strictures of *Arrow Transportation* and *Southern Railway* on the nicest of distinctions.

628 F.2d at 243. This Court on December 15 denied certiorari in *Papago*, unpersuaded by arguments similar to those in the instant petitions.[24]

The issue the Court of Appeals declined to review in the Telpak case (whether the FCC was obliged to reject because the carrier had not complied literally with cost support filing requirements) is the same issue that was present in *Papago*. The *Papago* court, quoting *American Farm Lines* v. *Black Ball Freight Service*, *supra*, 397 U.S. at 536-39, held:

> The filing requirements are " 'merely aids to the exercise of the agency's independent discretion,' "

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[24] The Solicitor General in *Papago* opposed certiorari, contending that the decision "is consistent with the decisions of this Court and other courts of appeals, and does not merit further review." Brief for the FERC in Opposition, No. 80-465, pp. 3, 5-7. The most significant difference between *Papago* and the Telpak case is that the government is a substantial Telpak customer. *Compare United States* v. *ICC*, *supra*, 337 U.S. at 444-45 (Frankfurter, J., dissenting.)

> . . . giving rise to no duty in the agency and no power of review in the courts.

628 F.2d at 247.[25] The Telpak court thus followed recent D.C. Circuit precedent that, in turn, rested on rules of unreviewability established in the *Arrow Transportation-Southern Railway* line of cases and in *American Farm Lines*. (ARINC App. B, pp. 58-62).

The decision is consistent also with the FCC's stated purpose in the order adopting Section 61.38:

> [T]he purpose and effect of our rules in this regard is not to impose new burdens of proof on carriers but is to provide us with information by which, in the reasonable exercise of our discretion, we can determine the orderly and proper procedures to follow in the solution of the difficult and complex problems increasingly presented in tariffs . . . . In short, the purpose of the rules is to elicit information and data which will facilitate the Commission's judgment as to whether such proposed tariffs present questions of lawfulness which warrant our investigation and hearing.[26]

In this case, the FCC determined in its discretion that it had enough data to decide whether to suspend and investigate, to reject, or to accept the tariff without

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[25] The Solicitor General's opposition to certiorari in *Papago* affirmed the correctness of this holding:

> [T]he Commission's procedural filing requirements were not intended to confer benefits on private parties and may be relaxed or waived within the Commission's discretion. The Commission's discretionary decision in this case to relax its own procedural rules is not subject to judicial review.

Brief for the FERC in Opposition, *supra*, p. 5.

[26] *Tariffs-Evidence, supra*, 40 FCC 2d at 152-53.

investigation. The Court of Appeals correctly found the agency's discretionary determination to be unreviewable.[27]

Nor have the petitioners revealed any decisions in other circuits which conflict with the decision below. Neither *Southern Natural Gas Co.* v. *FPC*, 547 F.2d 826 (5th Cir. 1977); nor *International Business Machines Corp.* v. *FCC*, 570 F.2d 452 (2d Cir. 1978), cited by ARINC, even discusses the issue of reviewability. Most of the D.C. Circuit cases cited as inconsistent with the rule of unreviewability also do not discuss the jurisdictional question.[28] Those cases, in

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[27] The FCC's decision to waive Section 61.38 and the Court of Appeals' decision not to review do not go to the reasonableness of the rates the Telpak customers now must pay. That question remained open, and the Telpak customers are free to invoke the FCC's complaint procedures, 47 U.S.C. §§ 206-209, and to argue, *inter alia*, that a volume discount would be just and reasonable under the Communications Act, 47 U.S.C. §§ 201(b), 205(a). A successful complaint about the level of rates will not necessarily result in restoration of a volume discount. But an easy or certain route to relief is not a prerequisite to a finding of unreviewability under *Arrow Transportation*. As this Court noted in *Southern Railway*, "it was possible in *Arrow* . . . that nonreviewability would leave the aggrieved party without any judicial remedy at all." 442 U.S. at 459 n.12. In this case, the Telpak customers do have the complaint remedy, which "alone suffices to render the FCC order non-final and unreviewable." (ARINC App. C, p. 66).

[28] *Associated Press* v. *FCC*, 448 F.2d 1095 (D.C. Cir. 1971), did assert that a refusal to reject may be reviewable. The *Papago* decision concluded that *Associated Press* "overstates the authority of the courts" and that it is best understood as holding that an order accepting a tariff may be reviewable "if the order violates a *duty* imposed on the agency." 628 F.2d at 246-47. *Papago* held that a FERC rule similar to Section 61.38 did not impose such a duty. *Id.*

any event, were pre-*Southern Railway*[29] and were discussed and reconciled in the D.C. Circuit's *Papago* decision, 628 F.2d at 246-47. It is clear that the rule in the D.C. Circuit, whatever it might have been before *Papago*, is that orders accepting tariff filings generally are unreviewable.[30]

Both petitioners overstate the extent of the holding on reviewability.[31] The Court of Appeals held only

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[29] The only exception to this is *American Broadcasting Co.* v. *FCC*, D.C. Circuit No. 78-1968 (decided April 28, 1980), in which the Court of Appeals reviewed a refusal to reject a tariff in the face of claims that the tariff abrogated existing contract rights. *Papago* made clear that the D.C. Circuit's general rule of unreviewability has an exception for orders challenged on so-called "*Sierra-Mobile*" grounds because those orders dispose finally of a substantive issue. 628 F.2d at 244-45, citing *United Gas Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). The *American Broadcasting* decision is an exception to the general rule because it is a "*Sierra-Mobile*" case. The Court of Appeals' review of the Section 214(a) issue in the Telpak case may be an exception that rests on the same rationale: The FCC had disposed finally of that substantive issue.

[30] Even if there were an intracircuit division, the D.C. Circuit should resolve the division and there is no occasion for this Court to intervene. See *Wisniewski* v. *U.S.*, 353 U.S. 901 (1957). No judge in the Court of Appeals voted to grant rehearing *en banc* in the Telpak case, indicating that the Court itself perceives no conflict among its decisions on this issue.

[31] The Solicitor General describes the decision below as holding that "the Commission's refusal to reject or investigate, no matter how unlawful, escapes judicial review . . . ." (U.S. Pet., p. 11). ARINC contends that the Court of Appeals "precluded *any* judicial review of the FCC's orders regarding even patently invalid tariff filings" (ARINC Pet., p. 15), even

that the Commission's discretionary choice in this case not to require AT&T to file cost data under Section 61.38 of the rules is not reviewable. That holding goes no farther than this Court's decisions in *American Farm Lines* and *Southern Railway*, and it is essentially on point with the D.C. Circuit's decision in *Papago*, which the Court in December 1980 declined to review.[32] The ruling on reviewability does not warrant the attention of this Court, which only recently considered the same issues in *Southern Railway* and on the certiorari petition in *Papago*.

Finally, both petitioners assert that the decision will have significance beyond Telpak, by breaching the intended protections of the Communications Act.[33]

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though the FCC had "resolved with finality important questions concerning the availability . . . of statutory protections" (*id.*, p. 13-14). These overbroad statements ignore the fact that the Court of Appeals reviewed on the merits the allegation of violations of Section 214(a)—the only "statutory protection" involved in this case and the only issue going to the validity of the rate filing that was "resolved with finality." (ARINC App. A, pp. 23-24; ARINC App. B, p. 57).

[32] The fact that the FERC in *Papago* had begun an investigation does not warrant a different result in this case, where the FCC had declined to begin an investigation. *Southern Railway* held that a decision not to investigate is unreviewable. *Papago* held, *a fortiori*, that a refusal to reject was unreviewable. There simply is no logical process whereby an unreviewable decision not to reject becomes subject to review by virtue of an unreviewable decision also not to investigate. The complaint procedure remains available in both cases.

[33] ARINC Pet., pp. 25-28; U.S. Pet., p. 11.

Both parties also discuss the large increase in overall costs to the Telpak customers as if that were justification for review. The Commission does not doubt that the Telpak customers will pay more for communications when the preferential dis-

The assertion rests on speculation that AT&T, with the FCC's acquiescence, may try to increase rates for its WATS offering by "abolishing WATS as it abolished Telpak." (U.S. Pet., p. 11). If that should occur in the same context as here—with the FCC in its sound discretion waiving Section 61.38 and the customers retaining their complaint remedy—we agree that the rule of unreviewability would apply. But the petitioners have not shown that this is anything more than speculation. The FCC already has required AT&T to allow "resale" of WATS, and AT&T did not withdraw its WATS tariff—as the ARINC hypothesis suggests it would. (ARINC Pet., p. 27). If AT&T should withdraw WATS in the future, any FCC decision with respect to the applicabil-

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count no longer is available to them. But similar aggrievements were alleged in *Arrow*, the *SCRAP* cases, *Southern Railway* and *Papago*. If the Telpak customers can establish, in complaint proceedings, that they are entitled to lower rates —even volume discount rates—they may obtain appropriate damages and possible prescriptions for the future. But the rule of *Arrow* and *Southern Railway* makes no exception for cases where the rate increase is a big one.

Both petitions mischaracterize a related FCC decision as "finding" that Telpak was producing a reasonable rate of return. (ARINC Pet., p. 6; U.S. Pet., p. 3). In fact, the FCC always has suspected that Telpak was priced far below the proper level, on the basis of fully distributed costs, although it never has established this in hearings. The return figures cited by the petitioners are AT&T's own figures, presented to the FCC in hearings in an effort to establish that Telpak was compensatory. The Commission did not accept those figures, and, in fact, expressed skepticism about them. *See AT&T* (Docket No. 18128), 61 FCC 2d 587, 659 (1976) (ARINC App. G, p. 154), 64 FCC 2d 971, 986 (1977) (ARINC App. H, p. 186). The earnings on Telpak, in any event, are not relevant to the issue of reviewability.

ity of Section 214(a) would be reviewable, just as the decision with respect to Section 214(a) was reviewed in this case. The decision below did not breach the statutory protections Congress designed for communications ratepayers, but rather was consistent with the carefully balanced statutory scheme as this Court repeatedly has interpreted it. See *AT&T* v. *FCC*, *supra*, 487 F.2d 864.

II. The Court Of Appeals And The FCC Ruled Correctly That Withdrawal Of The Telpak Discount Did Not "Discontinue, Reduce, Or Impair Service" Within The Meaning Of Section 214(a) So As To Require Prior Certification By The Agency.

The decision with regard to discontinuance of service pursuant to Section 214(a) also is correct and does not warrant this Court's attention.[34] Both the agency and the unanimous Court of Appeals found

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[34] Section 214(a) states, in pertinent part:

> No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby . . . .

This provision was added to Section 214(a) in 1943 as a companion to Section 222, which authorized the merger of domestic telegraph companies into what became the monopoly carrier Western Union Telegraph Co. Its principal purpose was to give the FCC supervisory control over service curtailment efforts by Western Union, such as the closing of public offices or the conversion of those offices into agencies. See *H.R. Rept. No. 69* (Consolidations or Mergers of Domestic Telegraph Carriers), 78th Cong., 1st Sess. (1943), at 10-11. See also, *Western Union Division* v. *U.S.*, 87 F.Supp. 324 (D.D.C.), *aff'd*, 338 U.S. 864 (1949).

that the withdrawal of the Telpak rate discount did not require prior agency certification. The Court of Appeals stated:

> The termination of the TELPAK "service" did not in fact discontinue, reduce, or impair any service at all; all it did was eliminate a rate discount, thereby effectuating a rate increase. All the services which had been offered under the TELPAK tariff were still available thereafter from AT&T pursuant to other tariffs or other sections of the same tariff; only the rates differed.

(ARINC App. A, pp. 23-24).[35]

This finding is consistent with the Commission's undeviating perception of Telpak—a perception two reviewing courts endorsed in earlier controversies over the discount rate.[36] It also is consistent with

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[35] Although the Court of Appeals stated broadly on rehearing that the Telpak decision was unreviewable, it did not delete its findings with respect to Section 214(a). (ARINC App. B, p. 57). The discussion of unreviewability focuses entirely upon the Section 61.38 issue and is contained in a separate subsection with that issue, which follows the subsection that deals with Section 214(a) on the merits. (*Id.* at 58-62). The Court of Appeals apparently regarded the decision with respect to Section 214(a) as final and reviewed and affirmed that aspect of the case on the merits. *Compare Papago*, 628 F.2d at 244-45.

[36] See *American Tel. & Tel. Co.* v. *FCC*, 449 F.2d 439, 446 n.5 (2d Cir. 1971) ("[T]he customer uses precisely the same physical facilities whether his service is ordinary private line, Telpak, or shared Telpak."); *American Trucking Ass'ns* v. *FCC*, *supra*, 377 F.2d at 128 ("[P]rivate line customers . . . at the time of the introduction of Telpak were given the new rates with no change whatever in the services they were being furnished.").

the FCC's view of Section 214(a) certification as necessary only when a carrier seeks to withdraw or impair service to a community, and not when the carrier continues to make the service available but changes the terms or rates for its use. The Commission has other statutes and other powers that were designed specifically to deal with rates.[37]

The Commission's interpretation of its own statute and its application in this case are entitled to deference, particularly where the analysis is sound and adheres to significant agency and judicial precedent. See *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 381. On the Section 214(a) issue, moreover, the Justice Department agrees with the FCC and the Court of Appeals that the withdrawal of the Telpak discount rate is not a discontinuance or impairment of service within the meaning of that statute.[38] Thus, the two government parties, on opposite sides of this litigation, are consistent on the interpretation to be given Section 214(a).[39]

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[37] 47 U.S.C. §§ 201-205, and the complaint procedures, 47 U.S.C. §§ 206-209. In view of the specific and detailed statutory scheme for dealing with rates, it is questionable whether the FCC could invoke Section 214(a) to delay or forbid a rate change. *Cf. MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365, 377 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978)

[38] See DOJ Brief for Respondent in the Court of Appeals, p. 16. In an earlier pleading, the Justice Department stated that "Telpak is not a separate, uniquely-identifiable service" and that its elimination "would not violate Section 214 . . . ." Memorandum in Support of Motion for Stay, D.C. Circuit No. 77-1521 (filed June 15, 1977), p. 13. The Justice Department's client agencies in this case are the largest single group of users of Telpak circuits.

[39] ARINC suggests that the FCC is bound by the representation of its counsel to the Second Circuit that "[i]f AT&T does

Even if the Commission were found to be in error on Section 214(a), the appropriate remedy would be to require it to consider on the merits any application from AT&T for certification of the abandonment of Telpak, under public convenience and necessity standards. The FCC has made clear already by its actions that it does not believe the demise of Telpak would adversely affect the public convenience and necessity.[40]

In its resale and shared use decision, the FCC confronted arguments by AT&T that unlimited resale and sharing would mean the end of Telpak:

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not want to allow resale or sharing of Telpak, it can apply to the Commission for permission under Section 214 to discontinue the service." (ARINC Pet., pp. 23-24). The FCC addressed this representation fully in its Telpak decision, pointing out that it was counsel speaking rather than the Commission, on a matter the agency had not yet considered and in a case in which the interpretation of Section 214(a) was not an issue. (ARINC App. D, p. 73). The FCC went on to point out its consistent view that Telpak differed from other private line offerings "only in its rates," and confirmed that its discontinuance did not require Section 214 (a) authorization. The FCC's authoritative statement on this matter in the resale litigation came in the brief on the merits filed jointly by the agency and the Justice Department:

> AT&T would be free to initiate rate changes that would eliminate Telpak.

Brief for Respondents, note 60 at p. 55, *AT&T* v. *FCC*, 572 F.2d 17. See also, *Chicago & N.W. Transp. Co.* v. *Kale Brick & Tile Co.*, 49 U.S.L.W. 4232 n.2 (decided March 9, 1981) (defining abandonment of service under an ICC statute similar to Section 214(a) as "characterized by an intention of the carrier to cease permanently or indefinitely all transportation service on the relevant line").

[40] The FCC has made no such specific findings, of course, because of its view that Section 214(a) does not apply to this tariff revision.

> Even if AT&T's position had merit, and Telpak could not exist without the restrictions on resale and sharing, *we find that its continued availability is not as important to the public as are the benefits which we see as resulting from resale and sharing* . . . .

Resale and Shared Use, supra, 60 FCC 2d at 286 (emphasis added). The Commission was willing, as a matter of public policy, to allow the demise of Telpak in order to obtain the benefits of resale and shared use of private line circuits.[41] Thus, even if there were plausibility to the applicants' Section 214 (a) arguments, this is a case in which "remand would be an idle and useless formality." *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969). The Section 214(a) issue does not warrant this Court's attention.

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[41] The correctness of this position is evident when one considers the history of Telpak. It was a carrier initiated rate discount that was suspect from the beginning. AT&T never has justified Telpak's obvious preference for large users. It would be anomalous for the Commission to consider and deny Section 214 authorization to terminate this discount rate, which it had not required the carrier to file and which it had investigated for many years because of its questionable legality. See, *e.g.*, *American Trucking Ass'ns* v. *FCC*, *supra*, 377 F.2d 121.

CONCLUSION

The Court should deny the petitions for a writ of certiorari.

Respectfully submitted.

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